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THE LIABILITY OF THE COMMON CARRIER AS DETERMINED BY RECENT DECISIONS OF THE UNITED STATES SUPREME COURT.

VI.

In 1906 Congress enacted various amendments to the Interstate Commerce Act, most notable of which, as bearing on the question under discussion, was what is known as the Carmack Amendment to the Hepburn Act, [51] which reads, "That any common carrier, railroad or transportation company, receiving property for transportation from a point in one State to a point in another State, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it, or by any common carrier, railroad or tranportation company to which such property may be transferred, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; *Provided,* that nothing in this section shall deprive any holder of such receipt or bill of lading, of any remedy or right of action which he has under existing law."

This Act has now been passed upon by the United States Supreme Court in all its important parts. An early New York case, by a curious process of reasoning, arrived at the conclu-

[51] Act June 29, 1906, c. 3591, Sec. 7, 34 Stat. 595 [U. S. Comp. Stat. Supp. 1911, p. 1307.]

sion that "the liability hereby imposed" was the liability of the initial carrier for a loss occurring on the line of a connecting carrier. The liability for a loss on its own line the court thought was the same as before the statute was passed.[52] The appellate court affirmed the decision[53] and apparently followed this interpretation of the statute, as did *Travis* v. *Wells, Fargo & Co.*[54] As New York by statute[55] now forbids the exemption of any common carrier from liability for loss, damage or injury caused by it, the distinction is perhaps of but small moment, since in practically all jurisdictions the carrier is now forbidden to stipulate against liability for the results of its own acts, and the Carmack Amendment extends the provision to contracts against liability for acts of the later connecting lines. The constitutionality of the Carmack Amendment in making the initial carrier liable for losses on any part of the route has been upheld in *Atlantic Coast Line R.R.* v. *Riverside Mills,*[56] and of another provision of the Interstate Commerce Act, requiring the issue of a bill of lading covering the whole route and, therefore, of the making of joint rates, in *Norfolk & Western Ry.* v. *Dixie Tobacco Co.*[57]

The most important decisions for our present purpose require detailed attention. The proviso of the Carmack Amendment was promptly considered in many state and some Federal cases, with the unanimous conclusion that its purpose was to save the shippers the rights they already had under many state statutes,[58] or holdings of the courts,[59] and under some constitutional provi-

[52]Greenwald *v.* Weir (N. Y. 1909) 130 App. Div. 696.

[53]Greenwald *v.* Barrett (1910) 199 N. Y. 170.

[54](1909) 79 N. J. L. 83.

[55]Public Commissions Act, Session Laws (1907) c. 429, § 38.

[56](1911) 219 U. S. 186.

[57](1913) 228 U. S. 593.

[58]See for example Donlon *v.* Southern Pac. R. R. (1907) 151 Cal. 763; Central of Georgia Ry. *v.* Hall (1905) 124 Ga. 322; Cutter *v.* Wells, Fargo & Co. (1908) 237 Ill. 247; Powers *v.* Chicago, R. I. & P. Ry. (1905) 130 Iowa, 615; International etc. R. R. *v.* Vandeventer (1908) 48 Tex. Civ. App. 366; Norfolk & Western Ry. *v.* Harman (1905) 104 Va. 501; Southern Exp. Co. *v.* Keeler (1909) 109 Va. 459.

[59]Southern Exp. Co. *v.* Owens (1906) 146 Ala. 412; Kansas City Southern Ry. *v.* Carl (1909) 91 Ark. 97; Miller *v.* Chicago B. & Q. Ry. (1909) 85 Neb. 458; Missouri etc. Ry. *v.* Harriman Bros. (Tex. Civ. App. 1910) 128 S. W. 932; Atchison etc. Ry. *v.* Rodgers (1911) 16 N. M. 120; Uber *v.* Chicago M. & St. P. Ry. (1912) 151 Wis. 431; Pace Mule Co. *v.* Seaboard Air Line Ry. (1912) 160 N. C. 215.

sions[60] which provided in substance that no contract modification of the common law liability of the carrier should be valid.[61]

All these cases were overthrown by the leading case of *Adams Exp. Co.* v. *Croninger,*[62] decided June 6, 1913. Following this decision, the court at the same time reversed and remanded the Latta and Miller cases cited, *supra.* In the Croninger case a diamond ring, for which plaintiff obtained a judgment of $137.52 in the Kentucky Circuit court, had been shipped under an express receipt limiting recovery to $50. On writ of error to the United States Supreme Court it was held that in the Carmack Amendment Congress had shown its intent to take over the whole subject of the liability of the common carrier on interstate shipments, and to supersede all state laws on that subject. The proviso that nothing therein contained should deprive the holder of a receipt or bill of lading of any remedy or right of action which he has under existing law, means under existing *federal* law. The court did not point out any existing federal law to which it could apply. So interpreted it is believed the proviso means absolutely nothing. The section did not deprive[63] the shipper of a single right he had under federal law. On the other hand it did extend his rights, at least in the important matter of liability for losses on connecting lines. But this liability of the initial carrier did not deprive the shipper of his right against any other carrier to which the goods should be delivered. Indeed it expressly provided that any such common carrier should be liable for losses caused by it.[64] In the opinion, the court points out that Congress had not previously legislated upon this subject, which would seem to prove that there was no existing *federal statute law* to which the proviso could apply. Neither could it apply to any *federal common law* for the common law enforced in the federal

[60]Latta *v.* Chicago St. P., M. & O. Ry. (C. C. A. 1909) 172 Fed. 850, (C. C. A. 1911) 184 Fed. 987; Pennsylvania Co. *v.* Kennard etc. Co. (1899) 59 Neb. 435; Southern Exp. Co. *v.* Fox (1909) 131 Ky. 257.

[61]But *cf.* Barnes *v.* Long Island R. R. (N. Y. 1906) 115 App. Div. 44, (Reversing 47 Misc. 318), affirmed (1908) 191 N. Y. 28, but construing the Kentucky constitution contrary to the construction adopted by the Kentucky court.

[62]226 U. S. 491.

[63]See dissenting opinion of Pitney, J., in Boston & Maine Ry. *v.* Hooker (1914) 233 U. S. 97, 155.

[64]Eastover Mule & Horse Co. *v.* Atlantic Coast Line R. R. (S. C. 1914) 83 S. E. 599; Baltimore etc. Ry. *v.* Sperber (1912) 117 Md. 595; Uber *v.* Chicago, M. & St. P. Ry. (1912) 151 Wis. 431, following Tradewell *v.* Chicago & N. W. Ry. (1912) 150 Wis. 259; see also dissent of Pitney, J., in Boston & Maine Ry. *v.* Hooker (1914) 233 U. S. 97.

courts is the common law of the several states in which actions may arise.[65] The court seems first to have made up its mind that the great evil lay in the great variety and confusion of existing state rules. It concludes that it is very desirable that these should be reduced to a uniform rule, and therefore that that must have been the intent of Congress in passing the Carmack Amendment and taking over the whole subject of limitation of liability. Is it not much more probable that, if Congress had such an intent, it put in the proviso as a concession to objections from States where existing law was more favorable to the shipper than the provisions of the Carmack Amendment? It was assumed by every court passing upon the question, before the decision of the Croninger case by the Supreme Court, that the proviso was intended to save to the shipper whatever rights he had under existing state law.[66] But whatever the views of the state courts before the Croninger case, all have accepted that as final, and, accordingly, limitations of liability as to value are upheld in interstate carriage by all courts, even those that still hold them void on intrastate shipments.[67] Accordingly if the shipper wishes the rights and remedies he formerly had in certain States, he must get Congress to write into the proviso of the Carmack Amendment the word "state", where the courts hold Congress meant to imply "Federal", or perhaps secure a Federal enactment similar to the state enactments of Nebraska, Iowa and Kentucky, which forbid contract limitations of common law liability.

[65]Pennsylvania R. R. *v.* Hughes (1903) 191 U. S. 477, 487; Chicago M. & St. P. Ry. *v.* Solan (1898) 169 U. S. 133.

[66]Southern Exp. Co. *v.* Hanaw (1910) 134 Ga. 445; Carpenter *v.* United States Exp. Co. (1912) 120 Minn. 59; Pace Mule Co. *v.* Seaboard Air Line Ry. (1912) 160 N. C. 215; Cramer *v.* Chicago R. I. & P. Ry. (1911) 153 Iowa, 103, and especially the following cases that were reversed by the United States Supreme Court: Miller *v.* Chicago B. & Q. R. R. (1909) 85 Neb. 458; Kansas City Southern Ry. *v.* Carl (1909) 91 Ark. 97; Missouri etc. Ry. *v.* Harriman (Tex. Civ. App. 1910) 128 S. W. 932; Latta *v.* Chicago, St. P. M. & O. Ry. (C. C. A. 1909) 172 Fed. 850, (C. C. A. 1911) 184 Fed. 987; see Adams Exp. Co. *v.* Croninger (1913) 226 U. S. 491, 513, 519; and Wells, Fargo & Co. *v.* Neiman-Marcus Co. (1913) 227 U. S. 469, 639, 657.

[67]United States Exp. Co. *v.* Cohn (1913) 108 Ark. 115; Kansas City & Memphis Ry. *v.* Oakley (Ark. 1914) 170 S. W. 565; Appel Suit Co. *v.* Platt (1913) 55 Colo. 45; Nashville etc. Ry. *v.* Truitt Co. (1914) 14 Ga. App. 767; Wabash R. R. *v.* Priddy (1913) 179 Ind. 483; Metz *v.* Chicago, R. I. & P. Ry. (1913) 90 Kan. 460; Louisville etc. R. R. *v.* Miller (1914) 156 Ky. 677; Harrison Granite Co. *v.* Grand Trunk Ry. (1913) 175 Mich. 144; Joseph *v.* Chicago, B. & Q. Ry. (1913) 175 Mo. App. 18; Missouri etc. Ry. *v.* Walston (1913) 37 Okla. 517; Pacific Exp. Co. *v.* Krower (Tex. 1914) 163 S. W. 9.

VII.

The question now arises, what is the position of the United States Supreme Court, which must in all interstate shipments be followed by all state courts, on a limitation of value which the carrier knows is not the true value of the property shipped. In the Croninger case the recovery was limited to $50 for a diamond ring worth $137.52. In the Latta case a recovery of $3,024.28 for the loss of a mare and colt was reversed, and the recovery limited to $100 each. In the Miller case a judgment for $1,315.50 for the loss of a stallion, shipped under a $100 limitation, was reversed. But in none of these cases does it appear, any more than it did in the Hart case, that the carrier really knew the true value, though $100 for a stallion would seem to be a very low figure if the carrier knew the horse was a stallion; and the same may be said of the Harriman case in which a limit of $30 for each bull and $20 for each cow was upheld on a shipment of four bulls and thirteen cows, "show cattle" worth $10,640.

But the most extended discussion of this point is in *Kansas City Southern Ry.* v. *Carl.*[68] Household goods worth $75 were packed in a box weighing 200 pounds, and shipped under a released valuation of $5 per hundredweight. If the goods had not been so released the rate would have been 78c per hundredweight higher. These tariffs were on file with the Interstate Commerce Commission, but plaintiff was allowed to testify that he did not know of the two rates, and that if he had he would have paid the higher. Though household goods are not for ordinary purposes valued by hundredweight, yet weighing is doubtless the most convenient, if not the most accurate and natural, means for a carrier of goods to fix the values, that are at best very uncertain and difficult to determine. As the carrier did not know the true value here, it may very well be that the contract should govern in this case. But the decision is of interest in a larger way. It held that if a carrier has filed rate sheets (as by law it is now required to do) which show two rates based on value, it is legally bound to apply that rate which corresponds to the valuation. If the shipper accepts a certain rate based on such value named in the tariff sheets, he is bound by it and is estopped from setting up a greater value, as much as though he had been asked and had declared the value and made a special contract accordingly.

[68] (1913) 227 U. S. 639.

"The ground upon which such a declared or agreed value is upheld is that of estoppel."

It has been before urged that there can be no estoppel if the carrier knows the declared value is not the real one, but the court does not seem to make this distinction. It goes on to say that the valuation declared upon as shown by the published rate must be conclusive in an action to recover for loss or damage a greater sum. "In saying this we lay on one side, as not here involved, every question which might arise when it is shown that the carrier intentionally connived with the shipper to give him an illegal rate, thereby causing a discrimination or preference forbidden by the positive terms of the Act of Congress and made punishable as a crime." But in *Atchison etc., Ry.* v *Robinson,*[69] the court cannot "lay on one side" that question, for it appears the shipper told the agent of the railway by telephone that he wished to ship "race horses" in time for some races next day.[70] There was a verdict below for $1,500, but the Supreme Court upheld a limit, as fixed by the rates paid, of $100 for each horse. The railway, through its agent, knew the special value of the

[69](1914) 233 U. S. 173; see also American Silver Mfg. Co. *v.* Wabash R. R. (1913) 174 Mo. App. 184, in which the shipper told the carrier that the goods were worth near $5000., and recovery was limited to $41.70 for half of them.

[70]The position of the Supreme Court on this point was fully settled by its decision handed down February 23rd, 1915, since the above was written, in George N. Pierce Co. *v.* Wells, Fargo & Co., 35 Sup. Ct. Rep. 351. The court upheld a judgment for $50. for the loss of a carload of automobiles worth more than $15,000. on the ground that the company had deliberately accepted a lower rate, and that to allow a higher recovery would defeat one of the principal objects of the Act which is to prevent discrimination. Congress was not long in dealing with that view of the effect of the Carmack Amendment. Only ten days after the Supreme Court had decided the Pierce case the Cummins Act (S. 4522) was approved, under the terms of which the carrier is liable, "for the full actual loss, damage, or injury to such property . . . notwithstanding any limitation of liability, or limitation of the amount of recovery, or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule or regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void." If the goods are hidden from view the carrier may require the shipper to specifically state in writing their value, and shall not be liable beyond the amount so specifically stated. The Cummins Act cannot of course be discussed in this paper, which was prepared some months before its passage. The full effect of it can only be determined by another series of decisions by the Supreme Court of the United States, but it may be noted that already the carriers have appeared before the Interstate Commerce Commission to present their view of the effect of the Cummins Act, and to ask for rulings by the Commission. See pamphlet, "Remarks of Mr. O. E. Butterfield before the Interstate Commerce Commission April 10, 1915"; before the Interstate Commerce Commission #49 (*ex parte*) Memorandum, Brief of Points of

horses. How can it now invoke estoppel? It may be the carrier has still a right to exact the higher rate.[71] The shipper, if he knowingly takes a lower rate, no doubt is liable to the penalties of the Elkins Act forbidding discrimination,[72] and so is the carrier. But if when goods have been shipped on the lower the carrier has a right to refuse to deliver the goods until the shipper pays the higher rate,[73] or to sue the shipper and recover the difference in rates,[74] why has not the shipper an equal right to pay the higher rate and recover the full value? That seems to have been allowed, in reverse order, in *American Exp. Co.* v. *Kimball & Nutter.*[75] The Robinson case seems to decide that he has not. The Carl case quotes with approval from the opinion of Commissioner Lane, in *In re Released Rates,*[76] but overlooks, or fails to follow, his contention that valuations known not to represent the true value are arbitrary and mere attempts to limit liability, and therefore void.[77]

VIII.

In the Carl case another important matter is discussed, namely, the difference in rates a carrier may make for larger responsibility. As before pointed out the carrier is in position to do an insurance business at a lesser rate than any outside company, and can easily gather a great volume of information from which to make tables of rates based on experience, similar to those in use by life and fire insurance companies. It should be noted that the carrier is not offering absolute insurance, as does an insurance company, but only insurance against losses due to his negligence. For other losses under contracts now in general use he is not liable in any sum. Under the Uniform Bill of Lading,

Oral Argument made by Francis J. James, and Interstate Commerce Commission #49 (*ex parte*) *In Re* the Cummins Amendment, decided May 7, 1915.

[71]Herminghausen *v.* Adams Exp. Co. (Iowa, 1914) 149 N. W. 234; Texas & Pacific Ry. *v.* Mugg (1906) 202 U. S. 242.

[72]But see the late case of Goldberg *v.* New York Central & H. R. R. (N. Y. 1914) 164 App. Div. 389, in which it was held that a mistake by the shipper's agent in his statement of the kind of goods shipped would not defeat a right to full recovery. The agent did not "knowingly and wilfully" misrepresent. The mistake can therefore be corrected, the carrier can collect the excess freight at the higher rate, and the shipper can recover for his goods.

[73]Texas & Pacific Ry. *v.* Mugg (1906) 202 U. S. 242.

[74]Louisville etc. R. R. *v.* Allen (1913) 152 Ky. 145.

[75](N. H. 1913) 86 Atl. 258, (1911) 76 N. H. 81; *cf.* Heilman & Clark *v.* Chicago & N. W. R. R. (Iowa, 1914) 149 N. W. 436.

[76](1908) 13 I. C. R. 550.

[77]See Pacific Exp. Co. *v.* Ross (Tex. Civ. App. 1913) 154 S. W. 340.

and by the form of express receipt approved by the Interstate Commerce Commission, as well as by the terms of the Carmack Amendment, the carrier is liable only for losses "caused by it", that is by its negligence. The carrier's charges are differentiated on the amount of the liability for this negligence. Thus, in the Carl case the rate used was a released valuation of $5 per hundredweight. If there was no release the tariff was 78c per hundredweight higher. There is no way on the facts stated to judge whether this was a proper cost of insurance in this case, but certainly it seems to indicate that the charge would have been the same for any value above the released value of $5 per hundredweight, whether the goods were worth $75 or $7,500. This certainly is far from a fair charge for insurance, or a scientific basing of rates. For goods of large value, it is clearly too low; for old or broken household goods it is as clearly too high. This is even clearer in the Harriman case, decided at the same time. Live stock shipped at "owners risk" was valued at $30 for each bull and $20 for each cow. "120% of the rates named in this tariff will be charged on shipments made without limitations of carriers liability at common law, and under this status shippers will have the choice of executing and accepting contracts for shipments of live stock with or without limitation of liability, the rates to be made as provided herein." That is, by paying a rate 20% higher, the Harriman Brothers would have been entitled to recover $10,640 instead of $380 for the four bulls and thirteen cows. That is certainly very cheap insurance. In the very recent case of *Nashville, etc., Ry.* v. *Truitt*,[78] the rate for restricted liability was $86 per car, and for unrestricted $172. The unlimited rate was double, in *American Silver Mfg. Co.* v. *Wabash R.R.*[79] Commissioner Lane has pointed out,[80] that "the differential should exactly measure the additional risk which the carrier assumes when the liability is unlimited.[81] An increased charge of 20% is manifestly out of all proportion to the larger risk involved, and its virtual effect is to restrict the public to rates calling for limited liability." This he calls a mischievous practice, the abolition of which would do much to improve the relation between the rail-

[78](1914) 14 Ga. App. 767.

[79](1913) 174 Mo. App. 184.

[80]*In Re* Released Rates (1908) 13 I. C. R. 550, 565.

[81]See Metz *v.* Chicago, R. I. & P. Ry. (1913) 90 Kan. 460, in which the court treats insurance by the carrier as in principle like fire insurance on a house. This is hardly so, for there is no compulsion to insure a house.

way and the shipping public. It is in point that this well-nigh universal unjust additional charge for higher valuations results in most cases of valuable shipments in the false billing forbidden by the Elkins Act, which is condemned in the Harriman case. In the Carl case the court holds that "the difference between two rates upon the same commodity, based upon valuation, is presumably no more than sufficient to protect the carrier against the greater amount of risk he assumes by reason of the difference in value." In view of the hopeless want of business system illustrated in the varieties of insurance rates offered in the cases just cited, this seems a violent presumption. "When the higher rate is no more than to reasonably insure the carrier against the larger responsibility a real choice of rate is offered, and the shipper has no reasonable excuse for undervaluation. If the margin between the rates is unreasonably beyond protection against the larger risk, the shipper may be induced to misrepresent the value to escape the unreasonably high rate upon the real value. This would result in permitting the shipper to obtain a rate to which he is not entitled, and in the carrier's escaping from a portion of its statutory liability." This, it is submitted, is just what does happen in most interstate freight shipments, and this the Elkins Act specifically forbids and purports to punish.

The court disposes of this whole question by saying it is one of the administrative duties of the Interstate Commerce Commission, and that "to the extent that such limitations are not forbidden by law, they become, when filed, a part of the rate." Putting this with such cases as *Atchison, etc., Ry.* v. *United States,*[82] and *Int. Com. Comm.* v. *Union Pacific R.R.,*[83] the conclusion seems to be that reasonable rates and reasonable differentials for different valuations are rate making matters committed to the Interstate Commerce Commission as part of its administrative duties. With them the courts have nothing to do unless it be made to appear that the rates fixed or approved by the Commission are not reasonable. Presumptively all rates now on file with the Commission are reasonable, but in any case no complaint can be made to the courts until the Commission has first been petitioned and has made its finding.[84] Until, there-

[82](1914) 232 U. S. 199, 220.

[83](1912) 222 U. S. 541, 547.

[84]See Louisville etc. R. R. *v.* United States (D. C. 1914) 218 Fed. 89, holding that if a carrier wishes to introduce new evidence in an appeal from the finding of the Commission it must first petition the Commission for a rehearing before it can appeal to the court.

fore, the Commission finds time to undertake the enormous task of inquiry as to the rates that are a reasonable charge for insurance by the carrier, the present irregular and unscientific filed schedules of charges seem to stand, or at least until a party aggrieved, shipper or carrier, can secure "an order of the Interstate Commerce Commission readjusting the rates to meet the requirements of justice, alike to shipper and carrier." The courts will not consider the reasonableness of the schedules now on file until after "proceedings contesting their reasonableness before the Interstate Commerce Commission."[85]

IX.

Furthermore, where the shipper accepts a classification or rate fixed in such filed tariff sheets he has made his contract. The carrier need make no other inquiry as to the value.[86] It becomes part of his bill of lading, and he is compelled to take notice of the provisions of the rate sheets.[87] The effect of this is to make "but one rate open to all alike and from which there could be

[85]Boston & Maine Ry. *v.* Hooker (1914) 233 U. S. 97, 121; Great Northern Ry. *v.* O'Connor (1914) 232 U. S. 508, 515, reversing O'Connor *v.* Great Northern Ry. (1912) 118 Minn. 223; George N. Pierce Co. *v.* Wells, Fargo & Co. (1915) 35 Sup. Ct. Rep. 351.

[86]Wells, Fargo & Co. *v.* Neiman-Marcus Co. (1913) 227 U. S. 469.

[87]Great Northern Ry. *v.* O'Connor (1914) 232 U. S. 508; Robinson *v.* Louisville etc. R. R. (1914) 160 Ky. 235, citing the leading case of Atchison etc. Ry. *v.* Robinson (1914) 233 U. S. 173; Wabash R. R. *v.* Priddy (1913) 179 Ind. 483; Zoller Hop Co. *v.* Southern Pac. Co. (Ore. 1914) 143 Pac. 931; American Silver Mfg. Co. *v.* Wabash R. R. (1913) 174 Mo. App. 184; United Lead Co. *v.* Lehigh Valley R. R. (N. Y. 1913) 156 App. Div. 525; *cf.* Kimball *v.* Express Co. (1911) 76 N. H. 81, in which the court allowed full recovery because the railway agent compelled the shipper to sign a limitation of value; International etc. Ry. *v.* Rathblath (Tex. Civ. App. 1914) 167 S. W. 751, in which the court held that the carrier had the burden of showing consideration, and as no benefit to the shipper had been shown by the carrier the agreement was void. In Adams Exp. Co. *v.* Cook (Ky. App. 1915) 172 S. W. 1096, it was held that the carrier has also the burden of proving that its tariffs had been publicly filed, and in the absence of such proof the Interstate Commerce Act does not apply, and the shipper may recover full value; Yazoo etc. R. R. *v.* Peeples (Miss. 1914) 64 So. 262, holding that the Croninger case does not apply where evidence fails to show that a lower rate was granted for a lower valuation, based on schedule filed with the Interstate Commission; American Exp. Co. *v.* Merten (1914) 42 Okla. 492, in which a trunk with a bride's trousseau was not checked because it was too valuable, but was shipped via express with a statement to the agent that it was "very valuable". There was no written valuation by receipt, and the company failed to comply with the requirement, that it "issue a receipt or bill of lading therefor". Held, the company is liable for the full value, though the tariff charged was for a fifty-dollar valuation.

no departure",[88] provided the rates are reasonably graduated and known, so that all alike will ship under the same rate. But the hardship on the shipper of this construction of the Hepburn Act, which was "intended to impose duties upon the carrier—the public servant—not upon the shipper or the passenger", is clearly brought out by Pitney, J., in his dissenting opinion in the Hooker case, before referred to.[89] It compels him to know the effect of a bill of lading accepted by him, which contains no words showing the limitation except a reference to the value determined by the tariffs and classifications on file, and these are too complicated for the understanding of the average shipper, even if he knew of their existence. If they were always fair this would not perhaps be serious, but no stronger showing of the injustice of this scheme is needed than is seen in our analysis of the principal cases decided by the United States Supreme Court in reaching the rule.

The whole effect of the decisions upon the Hepburn Act is to make its sole purposes to extend the liability of the initial carrier, to secure on all interstate shipments uniformity, and to prevent discrimination.[90] Though the tariffs now on file with the Interstate Commerce Commission are far from uniform, especially in the charges for the higher valuations, yet such tariffs, because they are on file, are presumed by the courts to be reasonable, and therefore all interstate shipments are now subject, both as to rates and as to value, to these tariffs, and will remain so until the Interstate Commerce Commission, on complaint or on its own motion, undertakes to examine and revise them. On the charges made for insurance it is to be hoped that the Commission may at an early day find time for a thorough inquiry, and a complete revision on proper principles, so that the shipper may be required to pay for insurance what it is reasonably worth. Then if he chooses to take a lower rate at "owner's risk", or at a limited value, there would seem to be no reason why he should not do so. This might go even to the extent of excusing the carrier from all liability, except that it will doubtless help to secure a better service and greater diligence from the carrier, if there hangs over him some penalty in the way of

[88]Boston & Maine Ry. *v.* Hooker (1914) 233 U. S. 97, 112.

[89]*Supra,* see especially p. 156.

[90]This is fully justified by the opinion of Justice Day, read since the above was written: George N. Pierce Co. *v.* Wells, Fargo & Co. (Feb. 23, 1913) 35 Sup. Ct. Rep. 351. But see The Cummins Act set forth in note 70, *supra.*

liability for losses due to negligence. On the other hand, the writer believes a more satisfactory relation between shipper and carrier would result from a voluntary assumption by all the great carriers of a liability as full insurers, against every hazard except the act of the shipper, at the lowest insurance cost consistent with a reasonable profit to the carrier from this insurance business.

X.

Not only are all interstate shipments now made under the provisions of the tariff filed with the Commission, but they are subject to the contract on the Uniform Bill of Lading approved by the Interstate Commerce Commission, June 27, 1908.[91] All carriers in such business are now therefore liable for losses caused by negligence, and the burden of proving freedom from negligence is on the carrier, but the amount for which the carrier is liable is "computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper, or has been agreed upon or is determined by the classification or tariffs upon which the rate is based . . . whether or not such loss or damage occurs from negligence." But as the rate paid by the shipper classifies the freight and limits the liability to the amount fixed by the tariffs for such rate, it would seem that the shipper can recover the actual value only when he pays a higher rate. In any case he cannot, of course, recover more than the actual value.

Express receipts, about one year ago, eliminated such void and illegal provisions of the forms long in use as "This Company is not to be held liable for any loss or damage, except as forwarders only," nor for the default or negligence of railways, steamboats, or other carriers by which the property is carried, and such carriers shall be deemed the agent of the shipper; nor for any loss or damage "from any cause whatever unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said Company or its servants." The company, under the new form of receipt, impliedly admits liability for losses caused by its own negligence, but in consideration of the rates charged, fixes the value at not exceeding $50

[91]Bills of Lading (1908) 14 I. C. C. R. 346, 351-355.

for any shipment for less than 100 pounds, nor at more than 50c. per hundred in excess of 100 pounds, unless a greater value is declared at the time of shipment and liability is limited to such amounts unless a greater value is stated and a greater charge paid, or agreed to be paid, therefor.[92] Here again if the greater charge be fairly graduated the agreement is equitable, as well as legal.

Finally, it may be noted that the difference between the rule that estops the shipper to claim a greater value than that on which his carriage rate was based, and the rule that insists that estoppel can be invoked only when the shipper failed to reveal the true value and the carrier in good faith charged at a less value, is not perhaps in practice so great as it might seem.[93] In many cases the carrier has no knowledge of the contents or the value of the shipment; in few cases does he actually know that the shipment is undervalued. Possibly with an end of the custom of rubber stamping receipts "Value asked and not given", when as a fact no value was asked or given, and with a little insistence that the carrier make reasonable effort, at least by simple inquiry, to learn the value, and then to bill accordingly, it would make no difference that the courts incline to hold as in the Robinson case. If under these circumstances the shipper does not state his value, then the results be on his own head, provided always he could be offered a fair choice at proper rates, between the lower and the higher value, so that he be not, as now, almost forced to what amounts to false billing. To this we are always brought back, namely, the urgent need of a fair adjustment of the varying rates for different values. It is to be hoped that the Commission will soon render a great service by working this out, for not only has the court left this to the Commission, but it is doubtless the body whose machinery and expert knowledge are best suited to attain ideal results. Certainly, neither the courts nor the legislatures are organized or equipped for accurate and efficient handling of the complicated administrative problems of insurance charges and rate making. The various public utility commissions have already done much to show that they are;

[92]See Express Rates, etc. (1913) 28 I. C. C. R. 131, 137-138.

[93]But by the decision of the U. S. Supreme Court in George N. Pierce Co. *v.* Wells, Fargo & Co. (1915) 35 Sup. Ct. Rep. 351, it was finally determined that it did not matter whether the carrier knew the true value. The valuation fixed by the rates governed in any case, for only so could all discrimination be avoided. But this has been nullified by the Cummins Act set forth in note 70, *supra.*

and notwithstanding some complaints, and some failures, the commissions have on the whole been able, not merely to gather a great mass of useful facts, and to formulate a useful body of fundamental principles, with valuable results to the public, but in some cases to render notable service to the carriers.[94]

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[94]See, for example, the findings of the Interstate Commerce Commission, based on its investigation of the organization and business methods of the express companies. *In Re* Express Rates etc. (1912) 24 I. C. C. R. 380; Express Rates etc. (1913) 28 I. C. C. R. 131.